of New Jersey, it was held that a receiver might issue certificates, the mortgage trustee assenting, to pay insurance premiums and also, the mortgage trustee objecting, to pay interest on a mortgage about to be foreclosed. *Lockport Felt Co.* v. *The Box Board Co.* (N. J. 1908) 70 Atl. 980. The same reasons of practical necessity, it is submitted, require that the trustee should represent the bondholders in the case of private, as well as in the case of public. corporations, with this difference; when an individual buys the bond of a public corporation he realizes that the needs of the public will require its continuous operation, and the trustee's authority to consent to the borrowing of money for this purpose may be implied;[10] but in the case of private corporations it would be unjust to imply such extensive authority, and his power to bind the bondholders should be restricted to those cases where the displacement of prior liens is necessary to preserve the property, and, since the interests of creditors alone are at stake, and no public interest, the court has no right to substitute its judgment for that of the lienholders or their representative.

RIGHTS IN THE FORESHORE.—Upon the nature of the ownership of the foreshore must largely depend the nature and extent of rights therein. In England, the *prima facie* title is conceived to be in the Crown, and although the origin of this conception has been viewed with suspicion[1] and its soundness severely questioned,[2] it has largely determined the foreshore rights. This proprietary interest in the Crown, the *jus privatum,* is subject to the public right,[3] the *jus publicum,* which comprehends the right of navigation and fishing and rights incidental thereto such as anchorage for a reasonable time and passage along the shore within reasonable limits.[4] That it did not include the right of bathing or unrestricted passage along the shore was established in *Blundell* v. *Catterall.*[5] That the right of fowling is not a part of the *jus publicum* has been held within the past year.[6]

In the United States the property status of the foreshore is difficult to determine. In Massachusetts by the Ordinance of 1647 the upland owner takes the fee with reservation to the public of the rights of navigation, fishing and fowling, but not of bathing.[7] The law of Maine is based upon the same Ordinance, while in Washington the fee is in the upland owner by constitutional provision. Where the matter has been judicially determined, as has been done in the majority of the states, it has been generally held that the title does not pass to the upland owners, but remains in the state[8]. The general tendency appears to be to give the greatest possible beneficial enjoyment of the foreshore, although differing conceptions of the nature of the State's ownership have been taken, materially affecting the extent of public rights. Concerning the State's title there

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[10]International Trust Co. *v.* Decker Bros., *supra.*

[1]Farnham, Waters and Water Courses, 182.
[2]Moore, Foreshore and Sea Shore (3rd Ed.) 181-668.
[3]Parmenter *v.* Atty. Gen. (1811) 10 Price 378.
[4]Fitzhardringe *v.* Purcell (1908) 77 L. J. 529.
[5](1821) 5 B. & Ald. 268.
[6]Brinckman *v.* Matly L. R. [1904] 2 Ch. 213.
[7]Buller *v.* Atty. Genl. (1907) 195 Mass. 79.
[8]Farnham, Waters and Water Courses, 209. To this rule, Pennsylvania and Delaware are the most notable exceptions. Tinicum Fishing Co. *v.* Carter (1869) 61 Penn. St. 21; Hartly & Hollinsworth Co. *v.* Paschall (1882) 5 Del. Ch. 435.

seem to be two main theories: (1) that the State has succeeded to both the *jus privatum* of the King and the governmental powers of Parliament over the *jus publicum;* (2) that the *jus privatum* is held by the State in trust for the use of a sovereign people, a trust which the State can no more rid itself of than the police power.[9]

From the first theory it follows, provided there are no State constitutional objections, that the State may treat the land as a private owner and grant it for a private purpose, thus extinguishing all public rights.[10] From the second, it follows that the State cannot extinguish the public right by a grant for a private purpose though it may grant for a public purpose.[11] If the legislature grants the foreshore for a private purpose, such a grant is merely a license, and may be revoked at any time.[9] It would seem that the legislature might determine at its discretion to what particular public use the foreshore may be put. Under such a theory it is but natural that the conception of public rights should broaden to include rights other than navigation and fishing. The right to bathe has been frequently referred to in American decisions as a public right,[12] while it has been broadly stated that the foreshore is subject to all reasonable public uses.[13]

These conceptions have also materially influenced the development of the rights of the upland owner, particularly the right of wharfing out. Under either theory it is possible to regard an unlicensed wharf as a purpresture,[14] but where the idea obtains that the foreshore is primarily for public use it is much less likely that such a doctrine will be enforced. Wharves being necessary and appropriate for the full enjoyment of navigation, the use of the foreshore for that purpose was permitted to the upland owner[15] until finally by usage, embodied in the law, he acquired an easement.[16] Such an easement, once given, could not, upon strict principle, be taken for any purpose without compensation.[17] But New York, following out the general scheme of subjecting the foreshore to the most beneficial public use, qualifies the right of access by the right of the State to devote the foreshore to a public use,[18] likewise, it would seem, the right to wharf out.

In *Smith* v. *Brookhaven,*[19] the courts of New York appear to have been guided by the broad trust theory. The town of Brookhaven, holding foreshore lands by crown grant, sued in trespass an upland owner who had built his wharf thereon. The court overturning the whole theory of private ownership in the foreshore, sustained the upland owner's rights on the ground that the accustomed exercise by property owners of inci-

[9]Illinois Central R. R. *v.* Ill. (1892) 146 U. S. 387.
[10]Langdon *v.* Mayor of N. Y. (1883) 93 N. Y. 129, at 154; Stevens *v.* Paterson, etc. R. R. Co., *post.*
[11]Arnold *v.* Mundy (1821) 6 N. J. L. 1; Cox *v.* State (1895) 144 N. Y. 396, at 405; Ill. Central R. R. *v.* Ill. (1892) 146 U. S. 387, at 453.
[12]See note 8 L. R. A. N. S. 1047.
[13]Comm. *v.* Roxbury (1857) 9 Gray 451, at 483. See also Ainsworth *v.* Munoskong etc. Club (1908) Central L. J. 400.
[14]People *v.* Vanderbilt (1863) 23 N. Y. 287; Cobb *v.* Commrs. of Lincoln Park (1903) 202 Ill. 427.
[15]Stevens *v.* Paterson etc. R. R. Co. (1870) 34 N. J. L. 532, regarding the upland owner's right as a license subject to revocation by the legislature.
[16]For a discussion of the nature of the right to wharf out, see 7 COLUMBIA LAW REVIEW 412.
[17]Yates *v.* Milwaukee (1870) 10 Wall. 497.
[18]Rumsey *v.* N. Y. & N. E. R. R. (1892) 133 N. Y. 79; Sage *v.* Mayor (1897) 154 N. Y. 61.
[19](1907) 118 N. Y. 174.

dental rights in property held by the state for the sovereign people had become a common right. It further declared that such rights are subject to the rights of the public. Recently the courts of the same jurisdiction have been called upon to apply the latter proposition. In *Barnes* v. *Midland Ry. Terminal Co.* (1908) 40 N. Y. L. J. 927, the plaintiff contended for the public right to pass along the shore which had been obstructed, though unnecessarily, by the wharf of an upland owner. The right of passage was upheld as incidental to the rights of fishing, boating and bathing. The court intimates that, had the wharf necessarily been of such a character as to obstruct the right claimed, it would have reached a decision by balancing the reasonableness of the conflicting rights. The decision is professedly in line with the *Brookhaven* case and well illustrates the influence that the trust conception of the ownership of the foreshore has exerted in enlarging the old common law idea of the extent of both public and private foreshore rights.